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Supreme Court of the United States

No. 947

October Term, 1962

ARTHUR BURTON,

Petitioner,

vs.

C. E. TAYLOR, Sheriff of
Palm Beach County, Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, ARTHUR BURTON, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in this case on November 7, 1962.

OPINIONS BELOW

The Opinion of the Supreme Court of Florida (infra Appendix A, pages 1 through 4) has not as yet been reported.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 7, 1962. An Order denying petition for rehearing was entered by the Supreme Court of Florida on December 21, 1962 (infra Appendix B, page 5). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are as follows:

1. Fourteenth Amendment to Constitution of the United States as set forth hereinafter in Appendix C, page 6.

STATEMENT OF THE CASE

The petitioner was informed against in the Criminal Court of Record in and for Palm Beach County, Florida in the May Term, 1958 on three counts of "substantive felony of accessory before the fact to uttering a forgery" and three counts of conspiracy. A Motion to Quash the said Information was denied and the petitioner was found guilty of the three counts of substantive felony of accessory before the fact to uttering a forgery and sentenced to a term of five years of imprisonment on each count, said sentences to run concurrently. The petitioner is presently being confined pursuant to said conviction and sentence. The petitioner prosecuted an appeal from the said conviction and the said conviction was affirmed by the District Court of Appeal of Florida, Second District, on

April 5, 1961 (reported 128 So.2d 765) and certiorari was denied by the Supreme Court of Florida (133 So.2d 645). The Supreme Court of the United States also denied certiorari (370 U.S. 905, 8 L.Ed.2d. 401, 82 S. Ct. 1251). After denial by this Court of certiorari the petitioner filed in the Supreme Court of Florida his petition for writ of habeas corpus. In his petition for writ of habeas corpus, the petitioner set forth that the conviction and sentence under which he was detained was void, illegal and unconstitutional in that:

(a) the petitioner was convicted of an offense with which he was not charged in the Information;

(b) the Information failed to advise petitioner of the nature and cause of the accusation against him;

(c) Florida Statutes 776.02 (now repealed) under which the petitioner was convicted was unconstitutional in that such statute was too vague, indefinite and uncertain to constitute notice of the crime or crimes or unlawful acts which it purported to prohibit and prescribed no ascertainable standard of guilt.

(d) the Information failed to charge any offense whatsoever against the laws of the State of Florida.

The Supreme Court of Florida issues its writ of habeas corpus on July 16, 1962 commanding the respondent to make return showing the lawful cause and authority for the detention and imprisonment of the petitioner.

On November 7, 1962 the Supreme Court of Florida entered its judgment and opinion discharging the writ of

habeas corpus and remanding the petitioner to the custody of the respondent. In its opinion the Supreme Court stated:

> "Read in its entirety, it is clear that the challenged Information adequately informed petitioner of the nature of the accusation against him, the date of its alleged commission and of the particulars surrounding the transaction alleged to be a violation of the statute. It is true that it was inartfully and may have been defectively drawn, but it did not 'utterly' or 'wholly fail' to charge the offense for which he was tried."

A petition for rehearing was filed which specifically set forth that the conviction of the petitioner was a denial of due process of law under the 14th Amendment to the Constitution of the United States. The petition for rehearing was denied on December 21, 1962.

QUESTIONS PRESENTED

1. WHERE A DEFENDANT IS CHARGED IN A STATE COURT WITH THE CRIME OF BEING AN ACCESSORY BEFORE THE FACT TO THE COMMISSION OF A FELONY BY AN UNKNOWN PERSON DOES SUCH A CHARGE CONSTITUTE NOTICE OF THE SPECIFIC CHARGE AGAINST HIM, AS REQUIRED BY DUE PROCESS OF LAW PROVISION OF THE 14th AMENDMENT, PARTICULARLY WHERE PROOF OF GUILT OF A

PARTICULAR PRINCIPAL IS A PREREQUISITE TO A CONVICTION OF THE ACCESSORY.

2. WHERE THE FACTUAL ALLEGATIONS OF A CRIMINAL INFORMATION AGAINST A DEFENDANT IN A STATE COURT ARE SUCH AS TO CHARGE THE DEFENDANT AS A PRINCIPAL IN THE SECOND DEGREE, DOES THE CONVICTION OF THE DEFENDANT AS AN ACCESSORY BEFORE THE FACT VIOLATE THE DUE PROCESS OF LAW PROVISION OF THE 14th AMENDMENT, PARTICULARLY WHERE DISTINCTLY DIFFERENT FACTS ARE REQUIRED TO SUSTAIN EACH OF THE TWO OFFENSES.

3. WHERE A CRIMINAL INFORMATION AGAINST A DEFENDANT IN A STATE COURT IS SO DEFECTIVELY DRAWN AS TO NOT ADVISE SUCH DEFENDANT AS TO WHETHER HE IS CHARGED AS A PRINCIPAL IN THE SECOND DEGREE OR AS AN ACCESSORY BEFORE THE FACT, DOES A CONVICTION UNDER SUCH AN INFORMATION VIOLATE THE DUE PROCESS OF LAW PROVISION OF THE 14th AMENDMENT, PARTICULARLY WHERE DISTINCTLY DIFFERENT FACTS ARE REQUIRED TO SUSTAIN EACH OF THE TWO OFFENSES.

REASONS FOR GRANTING THE WRIT

I. The decision of the Supreme Court of Florida in the instant case upholding the validity of a charge of being an accessory before the fact to the commission of a felony by an unknown person is not in accord with the decision of this Court in **Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514 L. Ed.,** to the effect that an accused in a state criminal proceeding has a constitutional right to notice of the specific charge against him.

The information against the petitioner charged in each of the three counts upon which petitioner was convicted was that petitioner

> " . . . unlawfully did then and there feloniously commit the substantive felony of accessory before the fact to the crime of uttering a forgery in that he did then and there unlawfully and feloniously aid, abet, counsel, hire and otherwise procure a person or persons, the identity of which is to the County Solicitor unknown, to unlawfully upon May 22, 1956 utter and publish as true a certain false, forged, altered and counterfeited deed to and upon the Clerk of the Circuit Court, Fifteenth Judicial Circuit, the tenor of said deed is as follows: . . . then and there well knowing the same to be false, forged, altered and counterfeit with the intent then and there to injure and defraud the said . . . ".

The petitioner submits that to charge a defendant as an accessory before the fact to an unnamed person does not satisfy the requirement of due process of law

that a defendant be given notice of the specific charge against him. The guilt of the principal must be shown as a condition precedent to the conviction of an accessory. **Ex Parte Bowen, 25 Fla. 214, 6 So. 65; People v. Walker, Ill., 198 N.E. 353; State v. Gordon, Ohio, 92 N.E. 2d 305; Gibson v. State, 53 Tex. Cr. R. 349, 110 S.W. 41; Buck v. Commonwealth, 107 Pa. State Reports 486; Ogden v. State, 12 Wisc. 592; Crook v. State, 27 Tex. App. 198, 11 S.W. 444; Bishop, Criminal Law, Section 675.** Obviously, a defendant cannot defend himself against a charge of being an accessory to a principal unless he is advised as to the identity of the principal. This truth was recognized as long ago as the time of Lord Denham, who observed in the case of **Regina v. Caspar, 2 Mood. C.C. 101; 9 C & P 289,** with regard to the argument that the indictment must identify the principal, that

> "Otherwise the prosecutor may select out of a class of persons stated, and the prisoner be totally unprepared as to the individual selected."

This Court in **Cole v. Arkansas, supra,** recognized that,

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

To convict an accessory, the state must prove the guilt of the particular principal to whom the accused was

accessory. See **State v. Peel, Fla. App., 111 So.2d 728; Lee v. Tucker, Fla., 37 So.2d 582; Porter v. State, 200 Ga. 246, 36 S.E. 2d 794; Aston v. State, 136 Tex. Cr. Rep. 12, 123 S.W. 2d 1073.** To require a defendant to prepare a defense against a charge of being an accessory where the identity of his alleged principal is concealed from him imposes an unfair and impossible burden upon the defendant. A charge of being an accessory to A is a separate and distinct offense from a charge of being an accessory to B. The constitutional requirement of notice of the specific charge requires that a defendant be informed of the identity of the person to whom he is alleged to have been an accessory. The cryptic form of information required the petitioner to go to trial with the chief issue undefined. See **Russell v. United States, 369 U.S. 749, 766 82 S.Ct. 1038, 1048, 8 L.Ed. 2d 240.**

II. The decision of the Supreme Court of Florida in the instant case upholding the validity of the conviction of petitioner as an accessory before the iact where the factual allegations of the information constitute a charge of the distinctly different offense of being a principal in the second degree is not in accord with the decision of this Court in **DeJonge v. State of Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278,** to the effect that the conviction of a defendant in a state court on a criminal charge not made against the defendant is a denial of due process of law under the 14th Amendment.

The allegation of the presence or absence of the defendant determines whether the defendant is charged as a principal in the second degree or an accessory, **State v. Mayo, Fla., 60 So.2d 170.** The factual averments of the information in the instant case did not charge that the

petitioner **before the commission of the felony** counseled and procured the commission of the felony. Such an information could only charge the offense of being a principal in the second degree. See **Neumann v. State, 116 Fla. 98, 156 So. 237.** To charge petitioner with the offense of being a principal in the second degree and to convict him as an accessory before the fact is a denial to him of his constitutional right to due process of law under the 14th Amendment. **DeJonge v. State of Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278.** This is true even though the offenses are closely related and of the same general nature or character and punishable by the same grade of punishment. See **Penny v. State, 140 Fla. 155, 191 So. 190.**

III. The decision of the Supreme Court of Florida in the instant case holding that the information against petitioner, though it was inartfully and may have been defectively drawn, did not utterly or wholly fail to charge the offense for which he was convicted is not in accord with the decision of this Court in **Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644,** to the effect that an accused in a state criminal proceeding has a constitutional right to notice of the specific charge against him.

The Supreme Court of Florida recognized in the instant case that the information against petitioner was "... inartfully and may have been defectively drawn ..." but that it did not "utterly" or "wholly" fail to charge the offense for which he was tried. **Cole v. Arkansas, supra,** requires notice of a specific charge and a chance to be heard in a trial of the issues raised by that charge. The constitutional test to be applied is whether petitioner had notice of the **specific** charge against him, not whether the information utterly or wholly failed to charge an offense.

The information in the instant case states that petitioner committed "the substantive offense of accessory before the fact" but the facts alleged could only charge petitioner as a principal in the second degree. See **Neumann v. State, supra.** The petitioner has the constitutional right under the 14th Amendment to know the specific charge against him, that is, whether he is being charged as an accessory or as a principal. It could be said that the information does not "utterly" or "wholly" fail to charge the petitioner as a principal, just as it could be said that the information does not "utterly" or "wholly" fail to charge petitioner as an accessory. But the constitutional requirement remains that the petitioner must be advised of the **specific** charge against him.

CONCLUSION

To require the petitioner to defend against the information in this case was to require him to do battle with shifting shadows. The information was such that he could never know if he was charged as accessory or principal, two distinctly different offenses. To conceal the identity of the alleged principal, whose guilt must be established by the state, prevented any semblance of an opportunity to prepare a defense. To allow such a conviction to stand is to replace the 14th Amendment with the Star Chamber.

The petitioner respectfully submits that this Court should issue its writ of certiorari to review the judgment of the Supreme Court of Florida.

HILTON R. CARR, JR.

HERBERT A. WARREN, JR.

Attorneys for Petitioner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Writ of Certiorari was mailed to RICHARD W. ERVIN, Attorney General, and REEVES BOWEN, Assistant Attorney General, State of Florida, Attorneys for Respondent, this _____ day of March, 1963.

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1962

Case No. 31,888

STATE OF FLORIDA ex rel.
ARTHUR BURTON,

Petitioner,

vs.

C. E. TAYLOR, as Sheriff of
Palm Beach County, Florida,

Respondent.

Opinion filed November 7, 1962

Case of original jurisdiction—Habeas Corpus.

Carr & Warren for Petitioner

Richard W. Ervin, Attorney General, and Reeves Bowels, Assistant Attorney General, for Respondent

PER CURIAM.

July 10, 1962, counsel for Arthur Burton filed a petition for writ of habeas corpus in this court. We granted

the writ and required a return from the respondent as sheriff of Palm Beach County. Counsel for both parties have favored us with comprehensive briefs.

The return reveals that petitioner was informed against in the Criminal Court of Record in and for Palm Beach County, Florida, on three counts for the "substantive felony of accessory before the fact to uttering a forgery" and three counts for conspiracy. Petitioner's attorney of record at that time filed a motion to quash said information which motion was overruled. Upon a trial by jury petitioner was found guilty on all three counts charging "substantive felony" and sentenced to five years on each count, sentences to run concurrently.

On appeal the District Court of Appeal, Second District, affirmed the judgment and sentence. 128 So.2d 765. The Supreme Court of Florida denied certiorari without opinion. (See 133 So.2d 645.) The Supreme Court of the United States also denied certiorari without opinion. (See 370 U.S. 905, 8L. Ed. 2d 401, 82 S. Ct. 1251, and 370 U.S. 965 8 L. Ed. 2d 834, 82 S. Ct. 1588.) Petitioner was represented by competent counsel at every step in these proceedings, however, present counsel was apparently not retained until sometime after the Supreme Court of Florida denied certiorari.

Petitioner raised numerous points to support his discharge from confinement, but it appears that the main thrust of his argument is directed to the sufficiency of the information under which he was tried. The respondent admits that the information is inartfully or defectively drawn but contends that it does not "utterly fail" to charge a crime under the laws of the State of Florida.

See Hitson vs. Mayo, Fla. 1957, 99 So.2d 297, and Padgett vs. Windham, 1935, 120 Fla., 206, 162 So. 501.

As this court pointed out in Taylor vs. Chapman, 1937, 127 Fla. 401, 173 So. 143, 145:

> "We have frequently held that habeas corpus is not a substitute for a demurrer, motion to quash, or writ of error, and that it is not a remedy for relief from imprisonment under a judgment based upon a warrant, information, or indictment which is merely defectively or inartificially drawn. Ordinarily, an indictment or information which informs the defendant of the nature of the accusation against him, which does not wholly fail to charge an offense, and which enables a defendant to prepare his defense and protects him from a subsequent prosecution for the same offense, will not on habeas corpus be held so fatally defective as to render the judgment of conviction and commitment rendered thereon void and of no effect. Amos vs. Chapman, 108 Fla. 360, 146 So. 98; State ex rel. Moir v. Mayo, 121 Fla. 202, 163 So. 521; Johnson v. State, 99 Fla. 711, 127 So. 317; Lehman v. Sawyer, 106 Fla. 396, 143 So. 310; Hepburn v. Chapman, 109 Fla. 133, 149 So. 196. The power to discharge from custody by writ of habeas corpus is one that should be exercised with extreme caution and only in a clear case. It should not be so exercised as to needlessly embarrass the administration of justice. Reffkin v. Mayo, 155 Fla. 214, 55 So. 674."

Read in its entirety, it is clear that the challenged information adequately informed petitioner of the nature of the accusation against him, the date of its alleged commission and of the particulars surrounding the transaction alleged to be a violation of the statute. It is true that it was inartfully and may have been defectively drawn, but it did not "utterly" or "wholly fail" to charge the offense for which he was tried.

Petitioner challenges the validity of § 776.03, Florida Statutes. In view of the fact that § 776.02, Florida Statutes, was repealed by Chapter 57-310, no useful purpose would be served by a lengthy discussion of this challenge. Suffice it to say the act as interpreted since its adoption in 1868 does not suffer from constitutional infirmities. See Kauz vs. State, 1929, 98 Fla. 687, 124 So. 177; Ex Parte Bowen, 1889, 25 Fla. 214, 6 So. 65, and 4 Fla. Law Jour. 17 and 147.

The other points raised by the petition for writ of habeas corpus have been considered and found to be without merit. See Johnson vs. Mayo, Fla. 1954, 69 So.2d 307, 309.

For the reasons above stated, the writ of habeas corpus heretofore issued is discharged and the petitioner is remanded to the custody of the respondent.

It is so ordered.

TERRELL, Acting Chief Justice, O'CONNELL, CALDWELL and HOBSON (Ret.), JJ., and SMITH, Circuit Judge, concur

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1962

FRIDAY, DECEMBER 21, 1962

Case No. 31,888

STATE OF FLORIDA EX REL
ARTHUR BURTON,

Petitioner

-vs-

C. E. TAYLOR, as Sheriff of
Palm Beach County, Florida,

Respondent

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A True Copy

TEST:

Guyte P. McCord
Clerk Supreme Court.

APPENDIX C

XIV. AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.